A

## EDMUND CHAN KAI KHOON

v.

## ABRIZAH ABDULLAH & ORS

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02-37-2007(P)]

C

26 APRIL 2010

***COMPANY LAW:*** *Shares - Allotment - Return of allotted shares - Whether compensation must be paid - Holding costs and costs of registration of allotted shares, reimbursement of*

D

***CONTRACT:*** *Agreement - Shares - Return of allotted shares - Whether restitution could be ordered without compensation to a person who received benefit under a contractual agreement*

The plaintiffs, who were allotted shares in a public listed company
E ('allotted shares'), handed the allotted shares to the defendant to arrange financial facilities for them to take up these shares. The plaintiffs then claimed for the return of the allotted shares from the defendant. The High Court judge found for the plaintiffs and the defendant's subsequent appeal to the Court of Appeal was dismissed.
F The defendant was then granted leave to appeal to the Federal Court on the following question of law: whether restitution could be ordered without compensation under Malaysian law to a person who has received a benefit under a contractual agreement.

G **Held (allowing the appeal)**
**Per James Foong FCJ delivering the judgment of the court:**

**(1)** Although the defendant accepted the decision of the Court of Appeal there was one issue remaining. This was due, perhaps,
H to an oversight by the trial judge and the Court of Appeal in not making any provision for the payment of the allotted shares by the plaintiffs when the plaintiffs themselves, in their statement of claim, had declared that they were prepared to compensate the defendant for the return of the allotted shares
I "plus whatever holding charges incurred by the defendant". Aside from this, the plaintiffs' principal witness in his testimony

at the trial also confirmed that this should be a condition (payment for the allotted shares and holding charges) for the return of the allotted shares or their value thereof. Faced with this, plaintiffs' counsel at the outset of his submission acceded to this appeal. In short, the plaintiffs must pay the cost of the allotted shares before they could get them back or their value thereof. With this, the obvious answer to the question posed must be in the negative. (paras 5 & 6)

**(2)** In the present instance, "holding costs" was nothing more than the interest payment for the loans arranged by the defendant utilising the allotted shares as security and, perhaps, also the costs for the registration of these shares into the name of the bank nominee or nominees as security for the loans. Since there was evidence before the trial judge that the plaintiffs were servicing the interest on the loans taken by them, no claim for holding costs should be allowed for the period when this occurred. However, the plaintiffs had stopped payment of the interest at a certain period. Thus, it was only fair and reasonable that the defendant should be reimbursed for holding costs, from the time such payment of interest was stopped by the plaintiffs to the time when the allotted shares were returned to them, after the plaintiffs had paid for them. If the defendant pays *in lieu* of the return of the allotted shares, then the holding costs should be the interest up to the date that the defendant makes such payment after setting off the amount due by the plaintiffs for the allotted shares. As for the costs of registration of the allotted shares, this must be reimbursed by the plaintiffs to the defendant. (paras 8, 9, 10, 11 & 12)

*[Order accordingly.]*

***Bahasa Malaysia*** *Translation Of Headnotes*

Plaintif-plaintif, yang telah diperuntukan saham dalam sebuah syarikat awam yang disenaraikan ('saham yang diperuntukan'), memberikan saham yang diperuntukan kepada defendan untuk mengaturkan kemudahan kewangan untuk mereka mengambil saham ini. Plaintif-plaintif kemudian menuntut bagi saham yang diperuntukan untuk dikembalikan dari defendan. Mahkamah Tinggi memutuskan memihak plaintif-plaintif dan rayuan kemudiannya defendan ke Mahkamah Rayuan telah ditolak. Defendan kemudian

A diberikan kebenaran untuk merayu ke Mahkamah Persekutuan atas soalan undang-undang yang berikut: sama ada restitusi boleh diarahkan tanpa pampasan di bawah undang-undang Malaysia kepada seseorang yang telah menerima manfaat di bawah suatu perjanjian kontraktual.

B

**Diputuskan (membenarkan rayuan)**

**Oleh James Foong HMP menyampaikan penghakiman mahkamah:**

C **(1)** Walaupun defendan telah menerima keputusan Mahkamah Rayuan satu isu masih tertinggal. Ini diakibatkan, mungkin, kesilapan oleh hakim perbicaraan dan Mahkamah Rayuan tidak membuat apa-apa peruntukan untuk pembayaran saham yang diperuntukan oleh plaintif-plaintif apabila plaintif-plaintif sendiri, di dalam pernyataan tuntutan mereka, telah mengisytiharkan D bahawa mereka bersedia untuk memberi pampasan kepada defendan bagi pengembalian saham yang diperuntukan "campur apa-apa caj pegangan yang ditanggung oleh defendan". Selain ini, saksi utama plaintif-plaintif dalam testimoninya di perbicaraan juga mengesahkan bahawa ini sepatutnya suatu E syarat (bayaran untuk saham yang diperuntukan dan caj pegangan) bagi pengembalian saham yang diperuntukan atau nilainya. Berhadapan dengan ini, peguam plaintif-plaintif pada permulaan hujahannya menyetujui kepada rayuan ini. Pendeknya, plaintif-plaintif mesti membayar kos saham yang diperuntukan F sebelum mereka boleh mendapatkannya balik atau nilainya. Dengan ini, jawapan ketara kepada soalan yang ditanya mestilah dalam bentuk negatif.

**(2)** Dalam keadaan semasa, "kos pegangan" hanya merupakan G bayaran bunga untuk pinjaman-pinjaman yang diaturkan oleh defendan menggunakan saham yang diperuntukan sebagai cagaran dan, mungkin, juga kos untuk pendaftaran saham ini dalam nama penama atau penama-penama bank sebagai cagaran untuk pinjaman-pinjaman. Oleh kerana terdapat keterangan di H hadapan hakim perbicaraan bahawa plaintif-plaintif membayar bunga atas pinjaman-pinjaman yang diambil oleh mereka, tuntutan untuk kos pegangan tidak sepatutnya dibenarkan pada masa ini berlaku. Walau bagaimanapun, plaintif-plaintif telah menghentikan pembayaran bunga pada satu masa tertentu. Oleh I itu, ia hanyalah adil dan munasabah bahawa defendan seharusnya dibayar balik untuk kos pegangan, dari masa

bayaran bunga sebegitu telah dihentikan oleh plaintif-plaintif ke masa bila saham yang diperuntukan dikembalikan kepada mereka, selepas plaintif-plaintif telah membayar untuknya. Jika defendan membayar sebagai ganti pengembalian saham yang diperuntukan, kos pegangan sepatutnya merupakan bunga sehingga tarikh defendan membuat bayaran sedemikian selepas menolak amaun yang perlu dibayar oleh plaintif-plaintif untuk saham yang diperuntukan. Berhubungan dengan kos pendaftaran saham yang diperuntukan, ini mesti dibayar balik oleh plaintif-plaintif kepada defendan.

*[Diperintah sedemikian.]*

*For the appellant/defendant - Dato' Dr Cyrus Das (Tan Swee Cheng with him); M/s Cheong Wai Meng & Van Buerle*
*For the respondents/plaintiffs - Surinder Singh; M/s Ong & Manecksha*

*[Appeal from Court of Appeal, Civil Appeal No: P-02-971-2004]*

*[Editor's note: For the Court of Appeal judgment, please see Edmund Chan Kai Khoon v. Abrizah Abdullah & Ors [2007] 3 CLJ 672]*

*Reported by Suresh Nathan*

## JUDGMENT

**James Foong FCJ:**

**[1]** The plaintiffs were allotted shares (allotted shares) in a public listed company known as Palmco Holdings Bhd (Palmco). Due to their financial constrain, they handed the allotted shares to the defendant to arrange for financial facilities for them to take up these shares. Now they claimed for the return of the allotted shares from the defendant. In their statement of claim, they prayed for:

1. A declaration that the allotted shares belonged to them.

2. "An order that the defendant do sell and deliver the said shares (allotted shares) to the respective plaintiffs upon the plaintiffs respectively paying the defendant the sum of $2,645,758, $266,812, and $870,000, plus whatever holding charges were incurred by the defendant".

A 3. In the event that the defendant is unable to deliver the allotted shares, the defendant do pay the plaintiffs damages calculated at the market value of the allotted shares from the date of the service of the writ, "less the costs for holding of the shares at the date of the service of the writ, less the costs for holding the
B shares incurred by the defendant".

**[2]** At the High Court, the trial judge found for the plaintiffs and made the following orders:

1. That the allotted shares be returned to the plaintiffs.
C

2. Alternatively, if the allotted shares are not in the possession of the defendant or the defendant unable to deliver these to the plaintiffs, the defendant do pay for "the value of these shares as on the day the allotted shares were made available for sale in
D the open market".

3. Further, if the said shares are not in the possession of the defendant and the defendant is unable to deliver the said shares to the plaintiffs, then the defendant "do pay the plaintiffs the
E difference if any, between the price of the shares on the day the allotted shares were made available for sale in the open market and the value of the said shares as of the date of this judgment".

F **[3]** Dissatisfied with this decision, the defendant appealed to the Court of Appeal. The Court of Appeal dismissed his appeal and affirmed the orders of the High Court.

**[4]** Leave to the appeal to the Federal Court was granted to the defendant on 24 September 2007 to refer the following question of
G law:

> Whether restitution could be ordered without compensation under Malaysian law to a person who has received a benefit under a contractual arrangement?

H **[5]** Though the defendant accepts the decisions of the Court of Appeal there is one issue remaining. This is due, perhaps, to an oversight by the trial judge and the Court of Appeal in not making any provision for the payment of the allotted shares by the plaintiffs when the plaintiffs themselves in their statement of claim (see
I prayer 2 and 3) have declared that they are prepared to compensate

the defendant for the return of the allotted shares "plus whatever holding charges incurred by the defendant". Aside from this, the plaintiffs' principal witness (Syed Azahari Noh Shahbudin) in his testimony at the trial also confirmed that this should be a condition (payment for the allotted shares and holding charges) for the return of the allotted shares or its value thereof.

**[6]** Faced with these, plaintiffs' counsel at the outset of his submission before us acceded to this appeal. In short, the plaintiffs must pay for cost of the allotted shares before they could get them back or its value thereof. With this, our obvious answer to the question posed must be in the negative.

**[7]** With this out of the way, there remain still one issue of whether the defendant is entitled to "holding costs" for the allotted shares.

**[8]** We note that nowhere in the prayers of the statement of claim is "holding cost" mentioned. In prayer 2 of the statement of claim, the plaintiffs agreed to pay to the defendant "whatever holding charges were incurred by the defendant" and in prayer 3 thereof, the plaintiffs conceded that in order to get back the allotted shares or its value they should be "less the costs for holding the shares incurred by the defendant". From these, it is our opinion that "holding cost" in this instance is nothing more than the interest payment for the loans arranged by the defendant utilising the allotted shares as security and, perhaps, also the cost for the registration of these shares into the name of the bank nominee or nominees as security for the loans.

**[9]** It is the contention of the plaintiffs that such holding costs should be waived since there is evidence before the trial judge that the plaintiffs were servicing the interest on the loans taken by them.

**[10]** Having considered this, we hold the view that since the plaintiffs were servicing the loans (paying interest) no claim for holding cost should be allowed for the period when this occurred. However, we note that the plaintiffs, at a certain period, had stopped payment of the interest. So, it is only fair and reasonable that the defendant should be reimburse for the holding cost from the time when such payment of interest was stopped by the plaintiffs to the time when the allotted shares are returned them

A after the plaintiffs have paid for them. If the defendant pays *in lieu* of the return of the allotted shares then the holding cost should be the interest up to the date then the defendant makes such payment after setting off the amount due by the plaintiffs for the allotted shares. To defeat any attempt by the defendant in delaying payment
B *in lieu* of returning the allotted shares, we hereby make a consequential order that such payment *in lieu* should be made within 30 days from date hereof. In the event that the holding cost cannot be agreed between the parties then this will be assessed by the Senior Assistant Registrar of the High Court in Penang within the
C 30 days from date hereof.

**[11]** As for the second item, the costs of registration of the allotted shares, this must be reimbursed by the plaintiffs to the defendant.

D **[12]** There should be costs in this appeal to the defendant/ appellant. Deposit for this appeal be returned to the defendant/ appellant.

E

F

G

H

I